THE LAW SCHOOL.—The session of 1920-21 marks two important events in the history of the Law School. By the action of the Rector and Visitors, its doors have been opened to women of maturity and adequate preparation, three of whom are now registered as students. Also the requirements for admission to the Department have been raised to include, in addition to a standard high-school course, at least one year of college work.

Notwithstanding this requirement of additional academic preparation, which it is believed will materially raise the standard of work in the Law School, the enrolment at the date of going to press numbers 295, the greatest number at this time of the session in the history of the Department. The following table indicates the enrolment by states and countries:

Alabama	4	Montana	5
Arkansas	2	New Jersey	2
California	1	New York	3
Connecticut	2	North Carolina	4
Delaware	4	Ohio	3
District of Columbia	5	Oklahoma	3
Florida	2	Pennsylvania	4
Georgia	8	South Carolina	14
Idaho	2	Tennessee	7
Kentucky	9	Texas	4
Louisiana	1	Virginia	179
Maryland	9	Washington	2
Michigan	1	West Virginia	11
Mississippi	2	Porto Rico	1
Missouri	1		
		Total	295

The beginning of the session marks several changes in the Faculty. Professor Dobie has been granted a year's leave of absence to become executive director of the organization to raise the Centennial Endowment Fund for the University, having sacrificed his original plan to devote a year to study at Harvard. Professor Julius Goebel, Jr., has been appointed to conduct Professor Dobie's courses during his absence. Professor Eager has returned to the Law School after a year's leave of absence. Professor Hyde has left the University in order to engage in practice in New York.

The course in Forensic Debating has been made an elective and transferred to the third year.

VALIDITY IN A WILL OF A CONDITION AGAINST CONTEST.—What is the legal effect of a condition in a will prescribing forfeiture of a legacy if the legatee contests the will? This question has called forth such unusual dispute that the decisions are di-

verse and varied. Several jurisdictions, notably California [1] and Ohio,[2] have established the rule that such conditions are always valid, and that forfeiture in all such cases should be enforced. Other States have varied the rule, holding that the condition may be valid or void, depending upon the wording of the forfeiture clause, and upon the good faith of the contesting legatee. The text-writers have usually very carefully avoided making any definite statement of the law, and have treated the subject by giving the different viewpoints of the various courts, apparently overlooking the fact that, under certain circumstances, nearly all of these courts have come to one conclusion.

At one time, the courts were under the impression that such conditions were not adverse to public policy,[3] and that no other view should be admitted; but now, though it is still generally held that the policy of the law does not forbid such conditions, yet they are very strictly construed in favor of the contesting legatee;[4] however, in some jurisdictions, they are considered as against public policy.[5] When the working effect of such a condition is considered and analyzed, the last holding appears to be most sound.

Under the law, no will of personalty can become effective in any of its provisions until it shall have been admitted to probate by the court. Before admitting it to probate, it is the duty of the court to investigate the facts and circumstances attending its execution and bearing upon its validity, and to find judicially therefrom that such will was executed in due form, voluntarily and understandingly by the purported testator. If not so found, the will must be rejected and probate refused. True public policy demands that the court be informed of the real facts leading to the making of the will. If these facts are to be those actually connected with the making of the will, then they must come from those who are or were in a position to know them. The highway to the court must be kept clear of any threatening forces which might tend to terrorize or intimidate every beneficiary under the will—and yet, who would be more likely to know as to the facts surrounding the execution of a will, than the beneficiaries who may be supposed to be close, or at least closer than the rest of the world, to the testator? But if such a condition in the will be allowed, it, in itself, is just such a threatening force as might gag

[1] Estate of Hite, 155 Cal. 436, 101 Pac. 443; *In re* Miller, 156 Cal. 119, 103 Pac. 842.

[2] Bradford *v.* Bradford, 19 Ohio St. 546, 2 Am. Rep. 419.

[3] Bradford *v.* Bradford, *supra;* Moran *v.* Moran, 144 Iowa 451, 123 N. W. 202; Thompson *v.* Gaut, 82 Tenn. 310.

[4] Appeal of Chew, 45 Pa. 228; *In re* Kathan's Will, 141 N. Y. Supp. 705; Moorman *v.* Louisiana Trust Co. (La.), 203 S. W. 856; Moran *v.* Moran, *supra.*

[5] *In re* Friend's Estate, 209 Pa. St. 442, 58 Atl. 853, 68 L. R. A. 447, and note; South Norwalk Trust Co. *v.* St. John, 92 Conn. 168, 101 Atl. 961.

into silence those who aid the court in the proper interpretation of the instrument. The tendency of this would be to suppress material facts, and thus impede the administration of the law according to its true spirit. A good faith contest of a will is in strict line and scrupulous consistency with the duty of judicial investigation and determination imposed upon a court of law. The law guarantees that no instrument shall be deemed the will of the purported testator until a judicial investigation and determination of such fact be first had. This is the protection of the law to the dead and to his estate, as well as to the living. From the very nature of the case, the testator cannot waive or forbid it, or make it the basis for a penalty or forfeiture. Why, then, should he be allowed to speak through an instrument that cannot be investigated, for the investigation before a court is virtually forbidden?

It is more than possible that a will, regular in form and bearing the signature of the testator in the presence of witnesses, is, nevertheless, not his will. On the contrary, it may have been framed and even dictated by another, and the ideas and designs of the stronger will-power incorporated into the instrument. Into such a will, the proviso under consideration, forbidding contest under penalty, would surely find a place. The dictator or influencer of such a will would be more likely to embody that condition in the will than would the testator himself. On principle, therefore, and in the interest of good public policy, it seems clear that the contest in good faith, and for probable cause, should not be forbidden or penalized, nor should it be permitted to work a forfeiture of a legacy.

One point upon which nearly all cases are agreed on this subject occurs when the condition in the will fails to specify an actual gift over of the forfeited legacy if the legatee contests. The great majority of courts have held that such a condition is *in terrorem* and void.[6] The latest decision making this distinction and holding likewise is in a New York case, *In re Kozlay*.[7] In the United States Supreme Court, the same view was thus expressed in a *dictum* [8] by Chief Justice Marshall:

> "Even when the forfeiture of the legacy has been declared to be the penalty of not conforming to the injunction of the will, courts have considered it, if the legacy be not given over, rather as an attempt to effect a desired object by intimidation, than as concluding the rights of the parties."

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[6] Appeal of Chew, *supra;* Fifield *v.* Van Wyck, 94 Va. 557, 27 S. E. 446; Mallett *v.* Smith (S. C.), 6 Rich Eq. 12, 60 Am. Dec. 107; Rouse *v.* Branch, 91 S. C. 111, 74 S. E. 133. See *in re* Friend's Estate, *supra*. And this is especially well worked out in New York State, as is shown in the following cases: *In re* Wall, 136 N. Y. Supp. 452, *In re* Arrowsmith, 147 N. Y. Supp. 1016; affirmed, 107 N. E. 1073; *In re* Title Guaranty and Trust Co., 165 N. Y. Supp. 71.

[7] 171 N. Y. Supp. 669.

[8] Pray *v.* Belt, 1 Pet. 670.

And in a more recent case,[9] the same court, while distinguishing the particular facts at bar, quoted with approval a statement that when a legacy is given to a person upon the condition not to dispute the validity or dispositions in the will, the condition is not generally obligatory, but only *in terrorem;* that if, therefore, there existed *probabilis causa litigandi* and there was no gift over, the non-observance of the condition would not work a forfeiture. This distinction has been repudiated by but few courts.[10]

However, when there was a valid gift over, the cases are quite numerous in holding that such a condition is valid.[11] This view is stated as *dictum* in several cases,[12] and apparently rather reluctantly, at that; for there does not seem to be any reason strong enough to justify this distinction, and the courts have realized it. They have thus followed out this rule, after holding *contra* on another ground, i. e., where there was no gift over, and frequently have very lamely stated that it would be otherwise if there had been a gift over—yet they do not attempt to give a justification for this passing contention. In a brilliant dissenting opinion,[13] Williams, C. J., attacked such conditions in wills, not only as against public policy, but as invalid, either with or without a gift over. And he is supported in this by a *dictum* in *Mallet* v. *Smith.*[14] Making a further distinction, some cases have held that a general gift of the residue is not a gift over,[15] which coincides with the rules as laid down by several text-writers.[16]

Another distinction is made, which is most important of all, relating to the necessity of *probabilis causa litigandi* in the instituting of the proceedings for the contesting of the validity of the will. A recent Connecticut case [17] sanctions the view that a contest made in good faith and on probable cause will not work a forfeiture, and that the determination of the existence of probable cause puts no unusual or improper burden upon the court; and, in delivering the opinion of the court, Wheeler, J., states:

> "Where the contest has not been made in good faith, and upon probable cause and reasonable justification, the forfeiture should be given full operative effect. Where the contrary appears, the legatee ought not to forfeit his legacy. He has

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[9] Smithsonian Inst. *v.* Meech, 169 U. S. 398. This case *held*, however, on the particular facts at bar, that the condition here was a vital factor in the gift and, therefore, not *in terrorem.*

[10] Thompson *v.* Gaut, *supra;* Bradford *v.* Bradford *supra;* Estate of Hite, *supra.*

[11] Smithsonian Inst. *v.* Meech, *supra;* Rouse *v.* Branch, *supra; In re* Arrowsmith, *supra.*

[12] Appeal of Chew, *supra; In re* Vom Saal's Will, 145 N. Y. Supp. 307; *In re* Kozlay, *supra;* South Norwalk Trust Co. *v.* St. John, *supra.*

[13] Moran *v.* Moran, *supra.*

[14] *Supra.*

[15] *In re* Arrowsmith, *supra.*

[16] 2 LOMAX, EXECUTORS AND ADMINISTRATORS, p. 79; 1 ROPER, LEGACIES, p. 796.

[17] South Norwalk Trust Co. *v.* St. John, *supra.*

> been engaged in helping the court to ascertain whether the instrument purporting to be the will of the testator is such. The contest will not defeat the valid will, but it may, as it ought, the invalid will. The effect of broadly interpreting a forfeiture clause as barring all contests on penalty of forfeiture, whether made on probable cause or not, will furnish those who would profit by a will procured by undue influence, or made by one lacking testamentary capacity, with a helpful cover for their wrongful designs."

And this is directly stated to be the law by Schouler.[18] Likewise, another case [19] holds that to apply the strict rule as to forfeiture in all cases, would, at times, not only work a manifest injustice, but accomplish results which a rational testator could not have contemplated; as, for example, where the contest is on the ground of undue influence in procuring the will. Going still further, it has been stated that probable cause does not have to exist, for any legatee is entitled to have the will proved in its solemn form; [20] but this does not appear to be a sound doctrine. It has been established in California, and apparently conclusively in that jurisdiction only, that probable cause in the contest does not relieve the legatee of forfeiture;[21] and this view is hinted at, but asserted less strongly, by other courts where the forfeiture clause is sustained under all circumstances.[22] The latter holding seems equally fallacious.

From the cases as cited above, it appears that several rules are established by the great weight of authority in regard to the validity of the condition. First, if there is no gift over upon breach of the condition, and second, if the contest is made in good faith and upon probable cause, then the condition is void. And these two requirements must coincide to enable a legatee on condition against contest successfully to contest the will. Conversely, if there is a valid gift over, and the contest is not made upon probable cause, then the forfeiture may generally take place. When there is a valid gift over, and the contest is made upon probable cause, even then the legacy should not be forfeited, for the good faith of the legatee and his probable cause for the contest, protect him. And when there is no valid gift over, and no evidence of probable cause, and the good faith of the contesting party is not shown, then, according to the dictates of reason and sound public policy, the condition should be held valid. Thus the controlling feature in each case is the existence or non-existence of probable cause and good faith, and this should be the basis for the decision of all such questions.

R. B.

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[18] 1 SCHOULER, WILLS, 5th ed., § 605.

[19] *In re* Friend's Estate, *supra.*

[20] 2 LOMAX, EXECUTORS AND ADMINISTRATORS, p. 78; LOVELAND, WILLS, p. 331. And all legatees have this right. 3 ALEXANDER, WILLS, § 1293.

[21] Estate of Miller, *supra;* Estate of Hite, *supra; In re* Shirley's Estate, *supra.*

[22] Hoit *v.* Hoit, 42 N. J. Eq. 588, 7 Atl. 856; Bradford *v.* Bradford, *supra;* Thompson *v.* Gaut, *supra.*